IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 3:05-cr-0576-JAJ

VS.

KERWIN LAMONT SUMMAGE,

Defendant.

ORDER

This matter comes before the court pursuant to the defendant's February 26, 2008, Motion to Dismiss pursuant to the Speedy Trial Act ("the Act") and the Sixth Amendment to the Constitution [dkt 68]. By order dated March 4, 2008, this matter was referred to United States Magistrate Judge Thomas Shields, for the issuance of a Report and Recommendation [dkt 69]. A hearing was held on that motion on March 25, 2008 [dkt 74]. On April 15, 2008, Judge Shields issued a Report and Recommendation finding that the defendant's rights under the Act had been violated but that there was no Sixth Amendment violation [dkt 76]. Additionally, Judge Shields recommended that the matter be dismissed without prejudice as a sanction. After receipt and review of matters submitted in response to the Report and Recommendation, the court adopts the ultimate conclusion of the Report and Recommendation and dismisses this matter without prejudice. This court also finds no violation of the Sixth Amendment right to a speedy trial.

PROCEDURAL BACKGROUND

On October 27, 2005, the defendant was arraigned on an October 14, 2005, indictment charging him with one count of production of child pornography, one count of possession of child pornography and a forfeiture allegation [dkts 11, 14]. The defendant had been earlier arrested on October 5, 2005 [dkt 3] and detained on a criminal complaint

[dkts 1, 9]. At arraignment, the matter was set for trial on January 3, 2006 [dkt 16]. Attorney Cory Goldensoph was appointed to represent the defendant [dkt 16].

On November 16, 2005, the grand jury returned a superseding indictment charging the defendant with two counts of production of child pornography, one count of possession of child pornography and a forfeiture allegation [dkt 18]. The defendant was arraigned on the superseding indictment on November 30, 2005 [dkt 20]. At the arraignment, the defendant requested that the matter be continued until January 30, 2006 [dkt 21]. Specifically, the defendant cited the complexity of the case as it pertained to discovery. Judge Shields agreed that the case was "complicated" and therefore the matter should be continued until January 30, 2006. ¹

On January 4, 2006, the defendant filed a motion to suppress evidence [dkt 22]. A hearing on the motion was held on January 30, 2006 [dkt 34]. In the interim, the defendant requested a continuance of the trial until February 27, 2006 [dkt 25]. He again cited the need for additional time to prepare for trial [dkt 25]. Judge Shields entered an order excluding the time occasioned by the continuance pursuant to the Act [dkt 27].

On February 15, 2006, the defendant filed a *pro se* motion for substitution of counsel [dkt 37]. Following a hearing on February 22, 2006, the motion was granted and on February 23, 2006, the federal public defender was appointed to represent the defendant [dkts 40, 43]. On March 14, 2006, the federal public defender requested a continuance of the trial date and the matter was continued until April 24, 2006 [dkt 45]. The public defender then filed a supplemental brief regarding the defendant's motion to suppress [dkt 46].

On April 5, 2006, Judge Robert Pratt entered an order granting the defendant's motion to suppress evidence [dkt 48]. The order was appealed on April 20, 2006 [dkt 50]. The decision to suppress evidence was reversed on appeal on April 10, 2007, by the

¹The court reviewed the audio recording of this arraignment.

Eighth Circuit Court of Appeals. <u>United States v. Summage</u>, 481 F.3d 1075 (8th Cir. 2007). The court's mandate issued on June 19, 2007 [dkt 56].

During the pendency of the appeal, the federal public defender withdrew and attorney Dean Stowers was appointed to represent the defendant. Shortly after the appeal mandate issued, the defendant filed another *pro se* motion for substitution of counsel, claiming ineffective assistance by Dean Stowers [dkt 58]. On June 26, 2007, Dean Stowers moved to withdraw [dkt 59] and the motion was granted on June 27, 2007 [dkt 60]. Anne Laverty was appointed to represent the defendant [dkt 60].

As the defendant and his new attorney contemplated an appeal to the U.S. Supreme Court, Judge Shields held a status conference on July 23, 2007 [dkt 63]. As a result of the status conference, the trial was continued until October 29, 2007 [dkt 64].

The defendant filed a Petition for Writ of Certiorari to the U.S. Supreme Court on September 6, 2007. Although the petition was denied on January 7, 2008, Summage v. United States, 128 S. Ct. 875 (2008), no notice of that decision was sent to this court until March 26, 2008 [dkt 75]. Between the date of the denial of certiorari and notice to this court, the defendant filed the instant motion to dismiss for lack of speedy trial [dkt 68].

CONCLUSIONS OF LAW

A. Speedy Trial Act

The Speedy Trial Act requires that a trial be commenced within 70 days following an arraignment. 18 U.S.C. § 3161(c)(1) (2007). The Act excludes from consideration any delay resulting from any pretrial motion from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion. <u>Id.</u> at § 3161(h)(1)(F). It further excludes delay reasonably attributable to any period not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court. <u>Id.</u> at § 3161(h)(1)(J). Also excluded is any period of delay

resulting from a continuance granted on the court's own motion or at the request of the defendant if the judge granted such continuance based on a finding that the ends of justice served by taking such action outweigh the best interests of the public and the defendant in a speedy trial. § 3161(h)(8)(A). The court must set forth, either orally or in writing, its reasons for such a finding. <u>Id.</u> Among the factors to be considered in excluding time pursuant to section 3161 (h)(8)(A), are whether the case is so unusual or complex that it is unreasonable to expect adequate preparation for pretrial proceedings or for trial within the time limits established by the Act, or whether the case, while not so unusual or complex, requires additional time for the defendant to be reasonably prepared for trial. <u>Id.</u> at §§ 3161(h)(8)(B)(ii) & (iv).

This court begins counting days for purposes of the Act from the date of the initial arraignment. <u>Id.</u> at § 3161(c)(1). Thirty-four days elapsed under the Act between the date of the defendant's initial arraignment and his arraignment on the superseding indictment.² The defendant argued on November 30, 2005, that the matter was complex due to the burdens created by discovery. The court agreed that the matter was "complicated" and granted the defendant's request to set the matter for January 30, 2006, for trial. The magistrate judge made no express statement as to whether the delay from January 3, 2006, until January 30, 2006, was excludable.

Although the court did not use the language of the Act to find that the continuance served the "ends of justice," the defendant argued for a delay that qualified for exclusion under the Act under sections (h)(8)(A) and (B). A court's finding that a matter is "complicated," in combination with the party's filings and the transcript of the hearing, suffices as findings of the case's complexity under the Act. Compare United States v.

The 70-day clock does not restart under section 3161(d)(1). <u>United States v. Long</u>, 900 F.2d 1270, 1275 n.4 (8th Cir. 1990). When an indictment is dismissed, and a second returned, the time between is excluded, rather than restarting the clock. <u>Id.</u> With a superseding indictment, there is no time between and so, logically, the clock continues.

Gamboa, 439 F.3d 796, 803 (8th Cir. 2006) (findings were sufficient to show that court considered speedy trial issues where order followed the language of the statute and the motion filed by a party and the transcript set out basic facts and circumstances), with Zedner v. United States, 547 U.S. 489, 495 (1976) (findings were not sufficient when court relied on a waiver of speedy trial rights and stated, "This [case] is a year old. That's enough for a criminal case," but did not mention the Act or did not make any findings supporting exclusion of time).

On January 4, 2006, the defendant filed a motion to suppress evidence. The delay from the filing of the motion to suppress on January 4, 2006, until the hearing on January 30, 2006, the post-hearing brief submitted on March 13, 2006, and the court's order of April 5, 2006, is excludable under the Act. While the motion was pending, the federal public defender was appointed and he reasonably requested a continuance until April 24, 2006. In the interim, on April 20, 2006, the government filed its appeal. The time between the filing of the appeal on April 20, 2006, and the mandate from the Eighth Circuit Court of Appeals on June 19, 2007, is excludable delay under the Act pursuant to section 3161(h)(1)(E).

After the mandate issued, six days of non-excludable time under the Act elapsed until the defendant's *pro se* motion for substitution of counsel was filed on June 25, 2007. After the motion was granted on June 27, 2007, twenty-seven non-excludable days elapsed until the court entered its July 23, 2007, order setting the case for trial on October 29, 2007, and specifically excluding the delay under the Act [dkt 63]. If trial had taken place on October 29, 2007, it would have been timely under the Act.

The Petition for Writ of Certiorari was filed in September of 2007. The defendant correctly cites Fed. R. App. P. 41 (d)(2) stating parties may file a motion with the court of appeals for a stay of mandate pending decision on a petition to the U.S. Supreme Court for a Writ of certiorari. Such a motion is optional and in the absence of such a motion, the district court regains jurisdiction. Fed. R. App. 41 (d)(2)(A). Neither party moved

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for a stay of the appeals court's mandate pending the U.S. Supreme Court's decision. From October 29, 2007, until the filing of the motion to dismiss on February 26, 2008, no finding exists on the record regarding exclusion of time. Therefore, an additional 120 days passed between the scheduled trial date of October 29, 2007 and the motion to dismiss without trial. The Act's requirement of trial within 70 days was violated.

B. Dismissal With or Without Prejudice

Although the deadlines and excludable time under the Speedy Trial Act are to be rigidly determined, the sanction for a violation of the Act requires more careful consideration of the reasons for the delays. Analysis clearly supports the government's request that this matter be dismissed without prejudice.

The Act entrusts to the district court's discretion the decision of whether to dismiss with or without prejudice. "[N]either remedy [should be] given priority." United States v. Elmardoudi, 501 F.3d 935, 941 (8th Cir. 2007) (citing United States v. Taylor, 487 U.S. 326, 335 (1988)). The Act guides the district court's exercise of discretion:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

Elmardoudi, 501 F.3d at 941 (citing 18 U.S.C. §3162(a)(2)).

In addition to these factors, a district court should consider the presence or absence of prejudice to the defendant resulting from the violation of the Act. Taylor, 487 U.S. at 334. If the district court "ignore[s] or slight[s] a factor that Congress has deemed pertinent to the choice of remedy," it abuses its discretion. Id. at 336-37. The district court is obliged to articulate its reasoning in order to permit an appellate court to review its decision. Id. at 336.

Much of the delay in this case is attributable to the defendant. The delays began on November 30, 2005, when the defendant requested a continuance of the trial in order to be adequately prepared. The defendant made another similar request on January 18, 2006. It was the defendant who filed a pro se motion for new counsel on February 15, 2006, and it was his new attorney who made a reasonable request for yet another continuance of the trial on March 14, 2006. Because of the defendant's request for substitute counsel, posthearing briefing on the motion to suppress was delayed until March 15, 2006, and the court decided this matter promptly thereafter on April 5, 2006.

A significant delay is associated with the appeal of this matter. Although the appeal was taken by the government, it prevailed. Following the decision of the court of appeals regarding the defendant's motion to suppress, the defendant again delayed this matter by moving for substitution of counsel. Each time the defendant moved for substitution of counsel, good lawyers entered this case and began their preparation from scratch. No one would suggest that a lawyer in a case of this complexity should be prepared for trial in less than sixty to ninety days.

Interlocutory petitions for writ of certiorari on suppression motions are exceedingly rare. Unfamiliar with U.S. Supreme Court procedures, court personnel acted as though a petition for certiorari was equivalent to an appeal to the court of appeals and waited for a mandate to be filed with this court. Regardless of this mistake, no one, not the U.S. Supreme Court, the Eighth Circuit Court of Appeals, the prosecutor or the defense lawyer, informed this court of the U.S. Supreme Court's denial of the petition for certiorari until March 26, 2008. Obviously, the court does not perform a daily search of such records to determine when such actions are taken.³

³At argument, defense counsel suggested that court personnel knew about the denial of the cert petition. There is no evidence of this.

The court considers all of the above facts and circumstances in combination with the seriousness of the charges and the impact a reprosecution would have on the administration of the Act and on the administration of justice. The court also must consider harmful effects the defendant may suffer from a violation of the Act. In the defendant's Objections to the Magistrate's Report and Recommendation, the defendant alleges he was prejudiced in multiple ways. Defendant's Objections at 10-13. First, the defendant makes the speculative statement that witness's memories of specific events "may have been compromised..." Second, the defendant claims that impeachment evidence against a key witness named Ms. Brown is no longer available. The defendant provides no indication as to what the evidence is or why it is no longer available. The defendant has not demonstrated, beyond speculation, that the evidence would have been persuasive to a jury or that the lack of the evidence is prejudicial. Third, the defendant alleges that a "Mr. Ash" died in October 2006 and "would possibly have been an alibi witness." These are not sufficiently particular allegations from which the court can find prejudice. Fourth, the defendant has alleged medical problems and financial difficulties. Considering potential prejudice in combination with the seriousness of the charges and the impact a reprosecution would have on the administration of the Act and on the administration of justice, this court finds dismissal without prejudice is appropriate.

Throughout the entire pendency of the case, this court has been ready, willing and able to resolve it. The simple fact is, two years transpired while courts resolved an issue pertaining to the defendant's Constitutional rights from the U.S. District Court all the way to the U.S. Supreme Court. While some criticism can be appropriately leveled at this court regarding compliance with the Act's requirement of oral or written findings excluding time and its mistake with regard to U.S. Supreme Court procedures, the decisions resulting in delay were understandable and certainly reflected no indifference to the right to a speedy trial.

C. Sixth Amendment

Sixth Amendment challenges are reviewed separately from the Speedy Trial Act. United States v. Thirion, 813 F.2d 146, 154 (8th Cir. 1987). However, "It would be unusual to find the Sixth Amendment has been violated when the Speedy Trial Act has not." United States v. Titlbach, 339 F.3d 692, 699 (8th Cir. 2003). Unlike the Act which begins counting days on the filing date of the information or indictment or from the first appearance, whichever is later, Id. at § 3161 (c)(1), the Sixth Amendment attaches at the time of the arrest or indictment, whichever comes first. United States v. Perez-Perez, 337 F.3d 990, 995 (8th Cir. 2003).

The U.S. Supreme Court has created a balancing test identifying four relevant inquiries in a Sixth Amendment right to a speedy trial claim: (1) whether delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for the delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as a result of the delay. <u>Doggett v. United States</u>, 505 U.S. 647, 651 (1991) (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).

1. Uncommonly Long Delay

The first inquiry is actually a double inquiry. Doggett, 505 U.S. at 651. To trigger speedy trial analysis, the defendant "must [first] allege the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." <u>Id.</u> at 651-52. Once the defendant has met this initial showing, "the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. Id. at 652. A delay approaching a year may meet the threshold of a "presumptively prejudicial" delay. Titlbach, 339 F.3d at 699. The one year threshold, although not a bright-line rule, has been strictly followed in this circuit. See United States v. Aldaco, 477 F.3d 1008, 1019 (8th Cir. 2007) (three and one half year delay is presumptively prejudicial); United States v. Shepard, 462

F.3d 847, 864 (8th Cir. 2006) (seventeen month delay is presumptively prejudicial); <u>Titlbach</u>, 339 F.3d at 699 (thirteen month delay is presumptively prejudicial, eight month delay is not); <u>United States v. Walker</u>, 92 F.3d 714, 717 (8th Cir. 1996) (thirty-seven month delay is presumptively prejudicial). <u>cf. Perez-Perez</u>, 337 F.3d at 995 (five month delay is not presumptively prejudicial); <u>United States v. White Horse</u>, 316 F.3d 769, 774 (8th Cir. 2003) (nine and one half month delay is not presumptively prejudicial); <u>United States v. Sprouts</u>, 282 F.3d 1037, 1043 (8th Cir. 2002) (four month or 125 day delay is not presumptively prejudicial); <u>United States v. Patterson</u>, 140 F.3d 767, 772 (8th Cir. 1998) (approximately five-month delay is not presumptively prejudicial); <u>United States v. McFarland</u>, 116 F.3d 316, 318 (8th Cir. 1997) (little over seven month delay is not presumptively prejudicial); <u>United States v. Lewis</u>, 759, F.2d 1316, 1351 (8th Cir. 1985) (seven-month delay is not presumptively prejudicial).

The presumptive prejudice can be overcome. "[S]peedy Trial standards recognize that pretrial delay is often both inevitable and wholly justifiable." <u>Doggett</u>, 505 U.S. at 656. If the government pursues a defendant with reasonable diligence, the defendant's speedy trial claim fails. <u>Id.</u> However, "persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice." <u>Id.</u> at 657. Great weight is attached to these considerations when they are balanced against the difficulty a defendant will have in going forward with trial due to the passage of time. <u>Id.</u> at 656.

The defendant has met the first part of the inquiry under the first factor by demonstrating the interval between arrest and trial was "presumptively prejudicial." A period of more than two years is sufficient to trigger evaluation of the delay by balancing the actions of the government and the defendant. The government's diligence in pursuing prosecution of the defendant in this case weighs heavily against the presumptive prejudice.

2. Government and Defendant's Responsibility for Delay

In determining whether the government or the defendant is more to blame under the second inquiry, courts have looked to whether the government sought prosecution of the defendant with diligence. See Doggett, 505 U.S. at 652. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." Barker, 407 U.S. at 531. "A more neutral reason [for delay] such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Id. "A valid reason...should serve to justify appropriate delay." Id.

The trial was continued on three different occasions at the request of the defendant. All three were granted due to the difficulty of counsel to prepare a complicated case in a short period of time. The first one was granted to the defendant's initial attorney and the other two were granted after the defendant requested, and was granted, new counsel. The defendant additionally appealed to the U.S. Supreme Court, which had the effect, correctly or incorrectly, of delaying trial pending their certiorari decision. All of these delays, attributable to the defendant, have valid reasons and justify appropriate delay.

The government, on the other hand, was not negligent, but rather diligent in its prosecution of the defendant. The government made no deliberate attempt to delay trial as no motions for continuance were made and prosecutors and investigators have little control over the speed of the courts. The delay attributable to prosecutors has valid reasons and is appropriate.

Additional time is attributable to the government due to the neutral cause for delay called "overcrowded courts" in the second inquiry in <u>Barker</u>. This court's docket is not overcrowded. The case could have been tried at any of its settings. However, this court considered the defendant's motion to suppress for three months (including attorney changes), the court of appeals considered the government's appeal on the same motion for fourteen

months and the U.S. Supreme Court considered the Petition for Writ of Certiorari for an additional three months. Under <u>Barker</u>, "responsibility for such circumstances must rest with the government rather than with the defendant." The court finds that these delays, although attributable to the government under <u>Barker</u>, are delays that are to be reasonably expected in a case as complex as the one before the court. The defendant's attorneys have needed delays in order to properly prepare for litigating the issues present. His current attorney represents that discovery is still ongoing. It is reasonable that courts should take sufficient time to properly consider the claims before them. The delays attributable to the government are explained by valid reasons and those reasons justify appropriate delay.

3. Assertion of Right to Speedy Trial

In the third inquiry, courts look to the actions of the defendant in determining whether the defendant has asserted the right to a speedy trial. See Barker, 407 U.S. at 522-23; Doggett, 505 U.S. at 653-54; Aldaco, 477 F.3d at 1019. Motions for continuances, failures to object to government motions for continuance, or failures to file motions for immediate trial can be interpreted as failures of the defendant to assert the right to a speedy trial. See Barker, 407 U.S. at 534-35; Aldaco, 477 F.3d at 1019; Titlbach, 339 F.3d at 699. The defendant's actions must be balanced against the actions of the government. Barker, 407 U.S. at 530, 533-34.

The defendant never asserted his right to a speedy trial until the filing of this Motion to Dismiss. The defendant moved for new counsel before and after the appeal to the circuit court and moved for continuances on both occasions. The defendant made no motion for immediate trial. After trial was not held on October 29, 2007, counsel made no objection. After defense counsel filed the cert petition, she called the clerk's office to ask if she needed to file another motion for continuance of the October 29, 2007, trial date. At argument, she represented that the clerk's office responded by saying it was not necessary as it was known that a cert petition was pending. After the U.S. Supreme Court

issued its denial of the petition for Writ of Certiorari, the defendant took no action to inform this court. Although the defendant has no duty to provide the court with this type of information, not doing so may be interpreted as a failure to assert a speedy trial right.

4. Prejudice

The fourth inquiry looks to prejudicial effects on the defendant. Barker, 407 U.S. at 532. The defendant has shown the delay in this case to be presumptively prejudicial. However, presumptive prejudice is overcome by the government's diligent prosecution. They have made no requests for continuance and it was the government's interlocutory appeal that caused a significant portion of the delay. The appeal, decided in the government's favor, demonstrates the government was not negligent, but rather, diligent in their prosecution. Therefore, as the presumptive prejudice has been overcome, this court inquires into actual prejudice the defendant may have suffered.

Three interests need to be protected in considering prejudice: (I) preventing oppressive pretrial incarceration; (ii) minimizing anxiety and concern of the accused; and (iii) limiting the possibility that the defense will be impaired. <u>Barker</u>, 407 U.S. at 532. The most serious is the third interest because an inability to prepare a defendant's case skews the fairness of the system. Id.

The defendant correctly asserts that Sixth Amendment claims must be considered separately from Speedy Trial Act claims. However, <u>Taylor</u> added a prejudice evaluation to Speedy Trial Act cases and Barker articulates prejudice as a Sixth Amendment inquiry. Therefore, the harm suffered by the defendant as a result of a delay is examined under both claims. The defendant, in his Objections to the Report and Recommendation, alleges prejudice resulting from delay in trial without specifically stating whether the prejudice is a result of a violation of the Act or a result of a Sixth Amendment violation. Defendant's Objections at 10-13. This court assumes the defendant is claiming the prejudice alleged

could have arisen from either a violation of the Act, a Sixth Amendment violation or both. Therefore, the analysis by this court of the alleged prejudice is the same.

Although it is true that the defendant has been incarcerated for a substantial period of time, likely causing some level of anxiety and concern, the defendant has not demonstrated a credible possibility that the defense will be impaired. As discussed above, the defendant makes speculative claims that evidence "may have" or "could possibly" have existed, but the defendant makes no showing of actual prejudice resulting from delay. In sum, the claims made by the defendant with regard to the fourth inquiry are not substantial enough to support a Sixth Amendment violation.

Significant delay occurred under the Act so as to require dismissal of the indictment against the defendant. After receipt and review of matters submitted in response to the Report and Recommendation, the court adopts the ultimate conclusion of the Report and Recommendation and dismisses this matter without prejudice. This court also finds no violation of the Sixth Amendment right to a speedy trial.

Upon the foregoing,

IT IS ORDERED that this matter is dismissed without prejudice to refiling under the Speedy Trial Act. The defendant's Sixth Amendment Speedy Trial Act claim is denied.

SOUTHERN DISTRICT OF IOWA

DATED this 13th day of May, 2008.